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Bally's Park Place, Inc. d/b/a Bally's Atlantic City and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO. Case 4-CA-36109

April 26, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on April 24, 2008, the General Counsel issued the complaint on April 25, 2008, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 4-RC-21286. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and alleging affirmative defenses.

On May 12, 2008, the General Counsel filed a Motion for Summary Judgment. On May 13, 2008, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

On June 27, 2008, the two sitting members of the Board issued a Decision and Order in this proceeding, which is reported at 352 NLRB 768.¹ Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit, and the General Counsel filed a cross-application for enforcement.

On June 17, 2010, the United States Supreme Court issued its decision in *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, holding that under Section 3(b) of the Act, in order to exercise the delegated authority of the Board, a delegee group of at least three members must be

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the powers of the National Labor Relations Board in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Thereafter, pursuant to this delegation, the two sitting members issued decisions and orders in unfair labor practice and representation cases.

maintained. Thereafter, the court of appeals remanded this case for further proceedings consistent with the Supreme Court's decision.

On November 30, 2010, the Board issued a further Decision, Certification of Representative, and Notice to Show Cause in Cases 4-CA-36109 and 4-RC-21286, which is reported at 356 NLRB No. 40. On December 8, 2010, the Union renewed its request to the Respondent for bargaining. On December 10, 2010, the Acting General Counsel filed an amended complaint in Case 4-CA-36109. Thereafter, the Respondent filed a response to Notice to Show Cause and Motion for Summary Judgment, and an answer to the amended complaint.² The Acting General Counsel filed a Statement in Support of Motion for Summary Judgment.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain,³ but contests the validity of the Union's certification on the basis of its objections to the election in the representation proceeding, and based upon certain arguments raised for the first time in this proceeding.

In its amended answer and in its response to the Notice to Show Cause, the Respondent argues that the motion

² In its response to the Notice to Show Cause, the Respondent sets forth arguments and authorities why the Board should not grant the Acting General Counsel's Motion for Summary Judgment. The response reiterates the Respondent's position taken in its answer to the original complaint, and later repeated in its answer to the amended complaint that the Union was not properly certified by the Board.

³ In its response to the Notice to Show Cause, the Respondent admits that on December 13, 2010, Rich Tartaglio, counsel for the Respondent, notified the Union that the Respondent was refusing to bargain for the purpose of testing the Board's November 30, 2010 certification. Citing *Howard Plating Industries*, 230 NLRB 178, 179 (1977), the Respondent argues that even assuming, arguendo, that the November 30, 2010 certification is valid, it cannot be found guilty of an unfair labor practice until its refusal to bargain on December 13, 2010. In *Howard Plating Industries*, the Board stated:

Although an employer's obligation to bargain is established as of the date of an election in which a majority of unit employees vote for union representation, the Board has never held that a simple refusal to initiate collective-bargaining negotiations pending final Board resolution of timely filed objections to the election is a *per se* violation of Section 8(a)(5) and (1). There must be additional evidence, drawn from the employer's whole course of conduct, which proves that the refusal was made as part of a bad-faith effort by the employer to avoid its bargaining obligation.

We find it unnecessary to decide in this case whether the unfair labor practice began on the date of the Respondent's initial refusal to bargain at the request of the Union, or at some point later in time. It is undisputed that the Respondent has continued to refuse to bargain since the Union's certification and we find that continuing refusal to be unlawful. Regardless of the exact date on which the Respondent's admitted refusal to bargain became unlawful, the remedy is the same.

for summary judgment should be denied because it was filed prior to a valid certification. We reject this argument. The motion for summary judgment remained pending at the time the Board issued its November 30, 2010 certification of representative, and the Respondent has failed to articulate any valid reason why the Board should not rule on the motion based on the facts and arguments raised by the parties in response to the Notice to Show Cause.

The Respondent also argues that the November 30, 2010 certification of representative was not valid for several reasons. First, the Respondent argues that the acts and conduct of the three-member panel in this case are “contrary to and in defiance of the September 20, 2010, Order of the U.S. Court of Appeals for the D.C. Circuit.” Although the Respondent’s argument in this respect is not entirely clear, it appears to be arguing that the court ruled in the Respondent’s favor on the merits of its petition for review, and that the Board cannot revisit this case at this time. We reject this argument. The court of appeals vacated the original decision in this matter based upon the decision of the Supreme Court in *New Process Steel*. Thus, other than the issues presented by *New Process Steel*, the court did not reach the merits of the earlier Board decision, and it remanded the case for further proceedings before the Board.

Second, the Respondent argues that the Board violated its due process rights by referring to and incorporating by reference the rationale set forth in the earlier (now-vacated) decision by two members of the Board. We reject this argument. As noted above, in vacating the earlier two-member decision, the court did not reach the merits of that decision. On remand, the Board considered the arguments raised by the Respondent in the underlying representation proceeding, and adopted the administrative law judge’s findings and recommendations as described in our November 30, 2010 Decision, Certification of Representative, and Notice to Show Cause. The fact that the Board found the rationale of the earlier decision to be persuasive and adopted it does not implicate the due process rights of the Respondent in any respect. The Respondent’s arguments have been considered and rejected, and have been preserved for judicial review.

Finally, the Respondent argues that the Board violated its due process rights by failing to adequately review the record and by following a standard format for issuing its decisions. We reject this argument as well. The Respondent relies heavily on the length of time between the issuance of the court of appeals mandate on November 18, 2010, and the Board’s decision on November 30, 2010. However, the Respondent ignores the fact that, on

July 23, 2010, the Board advised the parties in this proceeding that it had requested the court of appeals to remand this case in light of *New Process Steel*, and that the Board would consider the case and take action as appropriate. Thereafter, on September 20, 2010, the court of appeals vacated the earlier Board decision and remanded this case to the Board for further proceedings. Thus, the Board was aware that it would need to revisit this case long before the issuance of the mandate on November 18, 2010, and it was prepared to act promptly thereafter.

All other issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.⁴

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the operation of a casino at Park Place and the Boardwalk in Atlantic City, New Jersey (the Casino).

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, received gross revenues in excess of \$500,000, and purchased and received at the Casino goods valued in excess of \$5000 directly from points outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the representation election held on June 2 and 3, 2007, in Case 4–RC–21286, the Union was certified on November 30, 2010, as the exclusive collective-

⁴ Thus, we deny the Respondent’s request that the Board’s November 30, 2010 Decision, Certification of Representative and Notice to Show Cause be vacated.

bargaining representative of the employees in the following appropriate unit:

All full time and regular part time dealers, keno and simulcast employees employed by the Respondent at its Park Place and The Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

By letter dated December 8, 2010, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since December 8, 2010, the Respondent has failed and refused to bargain. We find that the Respondent's failure and refusal to recognize and bargain with the Union constitutes an unlawful refusal to recognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since December 8, 2010, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); and *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Bally's Park Place, Inc. d/b/a Bally's Atlantic City, Atlantic City, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Refusing to recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

- (a) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and, if an understanding is reached, embody the understanding in a signed agreement:

All full time and regular part time dealers, keno and simulcast employees employed by the Respondent at its Park Place and The Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

- (b) Within 14 days after service by the Region, post at its Atlantic City, New Jersey facility, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 8, 2010.

- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region at-

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 26, 2011

Wilma B. Liebman, Chairman

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain with International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full time and regular part time dealers, keno and simulcast employees employed by us at our Park Place and The Boardwalk, Atlantic City, New Jersey facility, excluding all other employees, cashiers, pit clerks, clerical employees, engineers, guards and supervisors as defined in the Act.

BALLY'S PARK PLACE, INC. D/B/A BALLY'S
ATLANTIC CITY